IN THE

Supreme Court of the United States

OCTOBER TERM, 1954

No. 143

KEARNEY-TRECKER EMPLOYEES LOCAL 1083, INTERNATIONAL UNION, UNITED AUTOMOBILE, AIRCRAFT & AGRICULTURAL IMPLEMENT WORKERS OF AMERICA, CIO, *Petitioner,*

v.

NATIONAL LABOR RELATIONS BOARD AND KEARNEY & TRECKER CORPORATION, *Respondents.*

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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SUPPLEMENTAL BRIEF IN OPPOSITION FOR RESPONDENT KEARNEY & TRECKER

In opposition to the recitals of the Respondent National Labor Relations Board in its "Memorandum", which, as Respondent Kearney & Trecker Corporation reads it, supports the petition for a writ of certiorari to the United States Court of Appeals for the Seventh Circuit, Respondent Kearney & Trecker Corporation respectfully represents:

1. The decision of the Court below does not turn upon the propriety of the Board's practice of applying its "schism" doctrine as an exception to its "contract-bar" rule in directing elections to determine employee representation.

There were just two contentions made to the Court of Appeals: Whether the facts as revealed by the record taken as a whole within the scope of review as set forth in the *Universal Camera*[1] and *Pittsburgh Steamship*[2] cases, justified and supported (1) the Board's Direction of Election on the basis of its so-called "schism" doctrine and (2) the Board's determination that the conduct of the election in fact permitted a fair, free, and impartial choice of a bargaining representative by the employees.

The Court refused to adopt the employer's contention on the first issue. It carefully pointed out, contrary to the inferences throughout the Board's "Memorandum":

> "It is asserted that the Board refused to follow its own decision in holding that a schism existed in the instant situation which justified it in ignoring its contract bar policy. The policy thus stated as well as the exceptions thereto are solely of the Board's creation and we see no reason why the Board cannot reasonably expand or restrict this policy as it sees fit. While we think there is merit in the company's contention that EIU was the sole organization which was or should have been recognized by the company, *we are not persuaded that the Board's action on this score was not within its discretion.*" (Decision, page 7; R. II-132.) [Emphasis supplied.]

Thus, the Court meticulously noted that its refusal to enforce the Board's order was not founded upon the Board's invocation of its schism doctrine but, as noted later in the decision, was based upon the Court's conclusion that the record considered as a whole did not support

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[1] *Universal Camera Corp.* v. *N.L.R.B.*, 340 U.S. 474.

[2] *N.L.R.B.* v. *Pittsburgh Steamship Corp.*, 340 U.S. 498.

the Board's finding that the election fairly reflected the wishes of the employees (Decision, page 8; R. II-132). This conclusion of the Court, in turn, was based upon the Board's failure to give adequate, if any, weight to the conduct of Petitioner in seizing the funds and properties of the E.I.U. (the competing union on the ballot) and in refusing to honor sick benefit claims from members of the E.I.U. unless and until they affiliated with Petitioner. The Court observed as to these matters that the Board treated them "with scant consideration" (Decision, pages 8-9; R. II-132). Moreover, the Court found that the improper and deceptive use made by Petitioner of the Board's Decision and Direction of Election, just prior to the election, "could well have affected the result of the election" (Decision, page 10; R. II-135).

In this regard, the "Memorandum for the National Labor Relations Board" concedes (page 16):

> "It is not clear, however, that the questions stated in the petition for certiorari are presented by the decision of the court below. Thus, the court's holding with respect to the question of successorship and ownership of union property may be susceptible of being interpreted not to turn upon Local 1083's entitlement to union assets, but *upon its coercive utilization of such assets to influence the election results*, regardless of the question of their ownership." [Emphasis supplied].

However, this document infers throughout that property rights have been put in issue by the Court. On the contrary, the Court did not hold that the Board should have resolved the issue of ownership pending before the State court. The Court expressly said, "With that litigation we need not be concerned, certainly we do not intend to prejudge it."[3] (Decision, page 8; R. II-133). But that litiga-

[3] The cases cited by the Board (Memorandum, page 13) as to the immateriality of property rights as between unions relate to contract-bar issues which are not here involved.

tion did not, the Court held, preclude the Board from discharging its obligation to evaluate the whole record, including the matters relating to the seizure of funds and deprivation of benefits, and from making factual findings which would stand up when weighed against the record taken as a whole. The Court further held that the Board could not disregard this record evidence in determining the validity of the election (R. II-132).

2. The relative scope of judicial review in a representation proceeding, as opposed to that in an unfair labor practice proceeding, is not in issue. Here, again, the Board concedes:

> "Similarly, in view of the court's silence with respect to the standard of review it applied to the Board's decision, it is not clear that the court disregarded the proper weight which must be attached to the Board's findings in election cases." (Memorandum, page 16.)

However, the Board infers the contrary (Memorandum, page 15, paragraph 2).[4] If this matter were in issue, Respondent Kearney & Trecker would be obliged to contend that all findings essential to sustaining a violation of Section 8 (a) (5) of the Act must be supported by the quantum of evidence set forth by this Court in the cases cited in our Brief in Opposition. However, it is plain that the Board's finding that the election clearly and fairly reflected the free choice of the employees—a conclusion which the Court held unsupported—was based on issues litigated in the unfair labor practice case, and not merely incorporated from the preceding representation case. (See B.A. 235-241).

3. The Court below, in rejecting the finding of the National Labor Relations Board that the conduct of Local

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[4] It is to be noted that the cases cited in the body of the Board's Memorandum, at pages 15-16, all *pre-date* the *Universal Camera* and *Pittsburgh Steamship* cases, *supra*, and *N.L.R.B.* v. *American National Insurance Company*, 343 U.S. 395.

1083 did not constitute such coercion as to invalidate the election, properly based its review upon the standards set forth by this Court in the *Universal Camera* and *Pittsburgh Steamship* cases.

The fact that the Court failed to use castigatory language in referring to the Board's decision does not mean that the Court was not applying the standards of review set forth by this Court in the *Universal Camera* and *Pittsburgh Steamship* cases. It is apparent that the Court held that the Board had based its conclusions of fact and of law on findings which were not supported by the record as a whole, in accordance with the standards set forth in those cases. For example, the Court stated in its decision (page 2; R. II-126):

> "We have accorded a great deal of study to the voluminous record before us but, in view of the conclusion which we have reached, we think that a relatively brief statement of the facts will suffice."

Again, the Court stated:

> "The Board, however, treats this matter [the seizure by Local 1083 of the E.I.U.'s property, money, books, and records and the deprivation of its members of access thereto or benefits therefrom] with scant consideration and in its Decision and Direction of Election refers to it only in the following statement: 'The E.I.U. further contends that it would be inequitable to hold an election while Local 1083 is still holding funds belonging to the E.I.U. As noted above, however, the question of the ownership of these funds is now pending before the courts. We are not convinced that an election should be delayed pending its determination.'" (Page 8; R. II-132).

Further along in its decision, the Court said:

> "It appears that the Board overlooked the wholesome principle enunciated in its decision in *The Matter of General Shoe Corporation*, 77 N.L.R.B. 124, as follows (page 127): 'In election proceedings, it is the Board's

> function to provide a laboratory in which an experiment may be conducted, under conditions as nearly ideal as possible, to determine the uninhibited desires of the employees. It is our duty to establish those conditions; it is also our duty to determine whether they have been fulfilled.' " (Page 10, R. II-134).

It is plain that the Court has concluded, applying the standards of review set forth in the *Pittsburgh Steamship* and *Universal Camera* cases, that the Board improperly disregarded important parts of the record before it in determining that the election held in the instant case constituted a valid election. This Court of Appeals was well aware of its obligations in reviewing decisions of the National Labor Relations Board. See *Whiting Corporation* v. *N.L.R.B.*, 200 F. 2d 43 (C.A. 7), decided January 2, 1952. In that case, the same Court held, in reviewing and setting aside a refusal to bargain order of the Board which turned upon the validity of the Board's determinations in a representation case prior to the unfair labor practice proceeding brought under Section 8 (a) (5) of the Act:

> "If, upon the scrutiny of the record prescribed by the Act and discussed in *N.L.R.B.* v. *Universal Camera Corp.*, 340 U.S. 474, we find that the evidence does not adequately support the Board's finding in this respect, then the union was not the employees' representative for collective bargaining and the order declaring petitioner guilty of an unfair labor practice in failing to negotiate with it must fall.
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> "The Supreme Court, in *N.L.R.B.* v. *Universal Camera Corp., supra*, has defined the nature of our review under the present law as follows: ' * * * Congress has left no room for doubt as to the kind of scrutiny which a court of appeals must give the record before the Board to satisfy itself that the Board's order rests on adequate proof. * * * Courts must now assume more responsibility for the reasonableness and fairness of Labor Board decisions than some courts have shown in the past. Reviewing courts must be influenced by a feeling that they are not to abdicate

> the conventional judicial function. Congress has imposed on them responsibility for assuring that the Board keeps within reasonable bound.' Consequently, in resolving this specific question of fact, in order to ascertain whether it 'rests on adequate proof,' it has been necessary to examine in detail those parts of the record submitted to us by the respective parties, bearing upon the question."

Although the Court did not feel obliged, at this late stage of the game, to set forth specifically in the instant matter the measure of review by which it tested the Board's decision, it is important to observe that the Court said, "We have accorded a great deal of study to the voluminous record before us . . ." (Decision, page 2; R. II-126). Moreover, in setting forth the basis for its conclusion that the Board's findings were not supported by substantial evidence on the record taken as a whole, the Court noted, as pointed out in excerpts quoted from its decision, *supra*, that the Board treated "with scant consideration" the issues arising from Local 1083's seizure of all the property, money, books, and records of the E.I.U. and deprivation of the latter's members of all access thereto or benefits therefrom (Decision, page 8; R. II-132). The Court further observed, in this regard, that the "Board overlooked the wholesome principle enunciated in its decision in *The Matter of General Shoe Corporation*," wherein the Board enunciated its standards for the conduct of elections and elaborated upon its functions in election proceedings (Decision, page 10; R. II-134). Finally, in setting forth its standards of review, the Court below stated (Decision, page 11; R. II-136):

> "In our judgment, the result of the election should not have been acquiesced in by the Board, and it should have refused to certify Local 1083 as bargaining representative."

Taken as a whole, these comments of the Court of Appeals clearly demonstrate that it concluded that the findings of the Board did not meet the standards as set forth in the *Universal Camera* and *Pittsburgh Steamship* cases. It would be ridiculous if the Court below were required either to use castigatory and condemnatory language as to the inadequacy of the Board's findings or be subject to the charge that it "did not intimate that the Board acted arbitrarily or capriciously," as is contended in the "Memorandum" (page 14). Such, indeed, are not the requirements of those cases. This Court has expressly said that in cases involving a violation of Section 8 (a) (5) of the Act the standards set forth in the *Universal Camera* and *Pittsburgh Steamship* cases are to be applied. See *N.L.R.B.* v. *American National Insurance Company*, 343 U.S. 395.

In conclusion, we submit that the so-called "Memorandum" of the National Labor Relations Board, which, in effect, attempts to sustain[5] Local 1083's Petition for a Writ of Certiorari, notwithstanding the Board's admitted doubt that the questions presented thereby are in issue, is in error since (1) the propriety of the "schism" doctrine of the National Labor Relations Board as an exception to its "contract bar" doctrine is not in issue in this proceeding, (2) no issue is raised herein as to the relative scope of judicial review in a representation proceeding, as opposed to that in an unfair labor practice proceeding, and (3) the standards of review of the Court below were based upon those enunciated by this Court in the *Universal Camera* and *Pittsburgh Steamship* cases. Thus, we reiter-

[5] The Board's "Memorandum" appears to constitute an attempt to accomplish through the "back door" what was denied to the Board by the Solicitor General in the first instance: Supreme Court review of the Court of Appeals decision at the behest of the Board. Moreover, in the last paragraph of its "Memorandum" (pages 16-17) the Board, in effect, suggests that the Supreme Court itself should, in this case, perform the duties and functions vested in the Solicitor General by 5 U.S.C. § 309, i.e., to conduct and control the Government's suits in the Supreme Court of the United States.

ate that no question of importance is raised by the Petition for Certiorari.[6]

Wherefore, we urge this Court to deny the Petition for Certiorari filed in the above-entitled matter.

Respectfully submitted,

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By LEON B. LAMFROM,
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Milwaukee, Wisconsin

and

DENHAM & HUMPHREY,
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Attorneys for Respondent,
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[6] As noted in our Brief in Opposition (page 9), the Solicitor General alleged to this Court in his Application for an Extension of Time within which to File a Petition for a Writ of Certiorari that the decision of the Court below presented no question of importance which would justify a Petition for a Writ of Certiorari. The National Labor Relations Board also reported to counsel for Respondent Kearney & Trecker in a letter dated June 11, 1954, and set forth as Appendix A herein:

> "Now that the Solicitor General has made his final decision not to seek certiorari to review the Circuit Court's denial of enforcement of the Board's order in Case No. 13-CA-971, the Board has decided to proceed with the representation proceeding initiated by the filing of Local 1083's petition in Case No. 13-RC-3837."

Because of this determination, the Board has compelled Respondent Kearney & Trecker to engage in extensive litigation in Cases Nos. 13-RC-3837 and 3922, which have been in hearing since August 11, 1954, and in which the sole issue is the very question which the Petitioner asks this Court to determine in its Petition for Certiorari, to wit, whether Kearney-Trecker Employees Local 1083, International Union, United Automobile, Aircraft & Agricultural Implement Workers of America, CIO, is indeed the statutory representative of these same employees of Respondent Kearney & Trecker. The pendency of this representation proceeding clearly shows that the propriety of the Circuit Court's rejection of the Petitioner's representative status cannot raise a question of great importance.

APPENDIX A

NATIONAL LABOR RELATIONS BOARD
Washington 25, D. C.

June 11, 1954

Robert N. Denham, Esquire
Denham & Humphrey
1025 Connecticut Avenue N. W.
Washington 6, D. C.

Re: Kearney & Trecker Corporation
and International Union,
UAW-CIO, Local 1083
Case No. 13-RC-3837

Dear Mr. Denham:

Now that the Solicitor General has made his final decision not to seek certiorari to review the Circuit Court's denial of enforcement of the Board's order in Case No. 13-CA-971, the Board has decided to proceed with the representation proceeding initiated by the filing of Local 1083's petition in Case No. 13-RC-3837.

The Board has deferred ruling at this time on the motion, contained in your letter of March 23, requesting the Board to issue a statement of policy as to certain conditions precedent to the processing of Local 1083's recent petition. The Board believes that the basic issues raised by your motion and by the Circuit Court's decision can be given proper consideration only upon a formal record duly made in normal course in Case No. 13-RC-3837 as to presently existing conditions bearing upon the question of whether a fair and free election may currently be held in the new proceeding.

You will, of course, be duly advised by the Board's agents of the further steps that will be taken in Case No. 13-RC-3837.

Sincerely,

FRANK M. KLEILER /s/
Frank M. Kleiler
Executive Secretary

cc: All Parties

APPENDIX B

The relevant provisions of Title 28 of the United States Code (45 Stat. 54, et seq.) are as follows:

> Conduct and argument of cases by Attorney General and Solicitor General.
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> Except when the Attorney General in particular cases otherwise directs, the Attorney General and Solicitor General shall conduct and argue suits and appeals in the Supreme Court and suits in the Court of Claims in which the United States is interested, and the Attorney General may, whenever he deems it for the interest of the United States, either in person conduct and argue any case in any court of the United States in which the United States is interested, or may direct the Solicitor General or any officer of the Department of Justice to do so. (R.S. §359; Jan. 31, 1928, ch. 14, §1, 45 Stat. 54.)